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No. 79-5780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOYT WEAVER, *Petitioner,*

v.

ROBERT GRAHAM, GOVERNOR OF FLORIDA, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

No reply is required to the non-argument portions of the brief of respondent other than to observe that manifestly no provision of the Florida Constitution is

now relevant. (*cf.* Resp. Brief 2). The argument of respondent, in fact, not only is unresponsive to the sole issue presented by the Florida statute in question, but represents an abrupt alteration of the position of the State of Florida in the Supreme Court of Florida in this case as well as in other matters now pending in other forums. Response to this altered position is made under appropriate topical headings, and no additional summary of argument appears essential. The same terms of reference used in the main brief of petitioner will be used here.

ARGUMENT

Adoption Of Section 944.275, Florida Statutes Cannot Be Construed As A Mere Prospective Procedural Change Or As Affording Ameliorative Relief

In his brief respondent asserts that Section 944.275, Florida Statutes (1979) is prospective in operation, is a mere remedial or procedural change, and is ameliorative is nature. In so arguing, respondent devotes little, if any, attention to his "act of grace" argument espoused before and adopted by the Supreme Court of Florida. In any event, the latest assertions also lack foundation in law or in fact.

Retrospective Operation

Respondent initiates his argument with the flat observation that Section 944.275 "does not operate retrospectively" (Resp. Brief 15). Presumably, this claim is premised on the fact that the statute did not operate

to take away gain-time already earned before the effective date. This argument, although not directly advanced by respondent below,[1] was anticipated and refuted by petitioner (Pet. Brief 59-62). Respondent makes no effort to respond to the contentions of petitioner in this respect. Respondent fails to suggest why the second statute is not "aimed at past acts and not future acts." *Cummings* v. *Missouri*, 4 Wall. 277, 327 (1867). Most significantly, respondent fails to controvert the reliance by sentencing judges on existing gain-time statutes (Pet. Brief 60).

Lack of Remedial or Procedural Effect

Respondent next contends that the gain-time statute is remedial or procedural in effect and thus does not fall within *ex post facto* restrictions (Resp. Brief 10, 16 *et seq.*). No effort is made to demonstrate that the gain-time statute is within that category other than to cite an irrelevant preamble to a statute adopted 21 years before

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[1] Doubtless it was not advanced below because *Lee* v. *State*, 294 So.2d 305 (Fla. 1974) *overruled on other grounds*, 340 So.2d 474 (Fla. 1976) held that a statute restricting parole could not be applied to crimes committed prior to its effective date. In commenting on *Lee* in another section of his brief (pages 4 and 5) respondent fails to present any meaningful distinction applicable here. The new position of respondent also ignores the definition of a retroactive or retrospective law, which is recognized in Florida as one, *inter alia*, which "attaches a new disability in respect to transactions or considerations already past." *Heberle* v. *P.R.O. Liquidating Co.*, 186 So.2d 280, 282 (Fla. 1st DCA 1966) (footnote omitted).

the statute in question. Respondent also offers the bald assertion that the prohibition against *ex post facto* laws "applies only to changes in substantive law and not to changes in procedure." (Resp. Brief 10) This Court has addressed and rejected that argument:

> "[C]an any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

Kring v. *Missouri*, 107 U.S. 221, 232 (1883).

That the statute with which this cause is concerned cannot be regarded as procedural is illustrated by a pronouncement by this Court quoted by respondent. In *Hopt* v. *Utah*, 110 U.S. 574 (1884) (cited at Resp. Brief 17, 18), the Court held that the statute in issue was not *ex post facto* because the punishment prescribed for the crime "remained unaffected by the subsequent statute." (110 U.S. at 589-590) In the present case petitioner's punishment is indisputably affected, and is affected to his material disadvantage. Thus, Section 944.275, Florida Statutes (1979) clearly runs afoul of the *ex post facto* prohibition when applied to petitioner and cannot rationally be treated as a mere procedural change.

In an effort to support the "procedural" argument, respondent has fallen back to the position that the Florida gain-time statute is not part of "the law annexed to the crime, when committed" in the words of *Calder* v. *Bull*, 3 Dall. 386, 390 (1798). In so arguing, respondent deals with only *one* of the four *ex post facto* tests

articulated by this Court and previously summarized by petitioner (Pet. Brief 30-31). The pertinent cases establish that a law is *ex post facto* when it imposes greater punishment than that specified by statutory provisions in effect at the time of the commission of the offense, when it has effects similar to those in the first category, when it alters the situation of the defendant to his disadvantage or when it imposes unpleasant consequences upon the defendant for prior conduct. Respondent similarly summarizes the law (*cf.* Resp. Brief 9, 11).

Accepting, *arguendo*, the limited basis of his argument, the respondent fails to offer a convincing reply even on the one test. Respondent, in fact, acknowledges that gain-time "often has the effect of determining how much of [the] sentence must be spent within the confines of the prison" (Resp. Brief 5-6), but insists that a statute under which a prisoner may earn gain-time as an award for good conduct is not part of "the law annexed to the crime." Respondent apparently cites *Stephens* v. *Conley*, 138 P.189 (Mont. 1914) in support of that conclusion (Resp. Brief 8). To the extent that case so holds, it must be deemed to have been overruled *sub silentio* by *State* v. *Ellsworth*, 380 P. 2d 886 (Mont. 1963), which expressly adopts the majority view in the United States that "[t]he good time law then in effect at the time the offense was committed 'enters into the judgment as if written therein.' " *Id.* at 888.

In any event, the argument carries no weight in the case of loss of gain-time credits for a punishment "which affects the term of confinement." *Wolff* v.

McDonnell, 418 U.S. 539, 547 (1974). "[A]n increase in the possible penalty is *ex post facto*, . . . since the measure of punishment prescribed by the later statute is more severe than that of the earlier. . . ." *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937). To the extent that the second statute has the effect of lengthening time served in prison, however, "regardless of the length of the sentence actually imposed," it constitutes "an increase in the possible penalty" which must be *ex post facto*. *Id.*

No authority is offered for the implied proposition that the gain-time statute must be literally "annexed" in the sense of actual incorporation or placement in a physically immediate location in the statutory scheme. However, the gain-time statute in question and the second degree murder statute were both present in Florida Statutes (1975) and were simultaneously adopted in the comprehensive biennial revisor's bill set forth in Section 11.2421, Florida Statutes (1975) (Chapter 75-169, Laws of Florida) (*see also*, Note, *Sketch of the Evolution of Florida Law*, 3 U.Fla. L.Rev. 74, 77-80 (1950)).

Absence of Ameliorative Effect

Respondent raises for the first time his argument that Section 944.275, Florida Statutes (1979) (the second statute) does not alter the situation of the petitioner to his disadvantage and is, therefore, ameliorative. This contention is utterly without merit and can be supported only by a distorted reading of Florida's statutory scheme.

Respondent claims that "the only gain-time allowances provided in the old statute [Section 944.27, Florida Statutes (1975)] are set forth in subsection (1)(a), (b) and (c) in the fixed amounts of 5-10-15 as above stated." (Resp. Brief 19-20) In addition, respondent states "that under the old statute at subsection (1)(c) the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence." (Resp. Brief 23) These statements are, at the very least, highly misleading. In making these statements, respondent totally ignores both Section 944.29, Florida Statutes (1975), (Pet. Reply Brief A 2a) which expressly provided "in addition to time credits, an extra good-time allowance for meritorious conduct or exceptional industry," and Section 945.21, Florida Statutes (1975) (Pet. Reply Brief A 2a), which authorizes the adoption of administrative rules relating to gain-time. Therefore, the first statutory scheme did, in fact, authorize the grant of extra gain-time for meritorious conduct or exceptional industry. In addition, administrative rules and regulations contained in the Florida Administrative Code implementing Section 944.29 (Pet. Reply Brief A 4a) were in effect both at the time petitioner was convicted (May 13, 1976) and at the time he allegedly committed the offense he was charged with (January 31, 1976).[2] These rules and regulations,

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[2] *See* brief of petitioner at 3. Respondent, at page 18 of his brief, compares the "new statute" with the "old statute" in effect at the time petitioner was convicted. (In his main brief, petitioner utilized the terms "first statute" and "second statute." When responding

relevant portions of which are reproduced in the appendix to this brief, contain provisions directly analogous to the statutory provisions enumerated and described by respondent (Resp. Brief 19-25).

A comparison of these pertinent rules and regulations with corresponding provisions of the statutes cited by respondent demolishes the argument of respondent. Rule 10B-20.03 (Pet. Reply Brief A 4a) provided one to six days per month extra gain-time for an inmate who faithfully performs assignments in a manner over and above that which would normally be expected of him, just as does Section 944.275(3)(a) (1979), wrongly claimed by respondent to be a dramatic new penal reform. Rule 10B-20.04 (1) (Pet. Reply Brief A 5a) authorized special gain-time of one to fifteen days per month for an inmate who is assigned to work at a building construction project authorized by the Department of Health and Rehabilitative Services; this Rule is similar to Section 944.275(2)(b) in providing work gain-time.[3] Section 944.275(3)(b) duplicates, almost verbatim, Rule 10B-20.04 (2) (Pet. Reply Brief A 5a) in rewarding an in-

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to respondent's arguments, both types of terminology are used.) Because the "old" statute and the rules and regulations referred to in this reply brief all were in existence at the time of conviction and at the time the offense allegedly occurred, petitioner has no quarrel with the point of reference chosen by respondent for purposes of his argument that the new statute is ameliorative.

[3] Respondent admits that this new statute permits only a maximum of fifteen (15) days work gain-time, apparently by administrative construction (Resp. Brief 23).

mate who does some outstanding deed with special gain-time of one to sixty days.[4] Consequently, Section 944.29, Florida Statutes (1975) and the rules implementing that section make it abundantly clear that, contrary to respondent's assertion at page 23 of his brief, an inmate could accumulate gain-time over and above the statutory gain-time provided by Section 944.27, Flordia Statutes (1975).

Even if the cited rules and regulations did not exist, Chapter 944, Florida Statutes (1975), when petitioner was convicted, afforded an inmate the opportunity to earn gain-time in excess of statutory gain-time pursuant to Section 944.29, Florida Statutes (1975). In fact, because this statute did not contain any limits on the amount of extra gain time allowable thereunder for meritorious conduct or exceptional industry, the enforcing authority actually had broader discretion than it has under Section 944.275, Florida Statutes (1979) in its present form.

A comparison of Chapter 944 as it exists now with Chapter 944 and its accompanying rules and regulations

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[4] The claims of respondent relating to time granted by the new statute for attending school or for disability are equally without merit for three or more reasons: (1) it is apparent that petitioner would be required to attend classes, an act not required by the old statute; (2) such credits were administratively allowable under the generalized provisions of Rules 10B-20.03 and 10B-20.4; and (3) there is nothing in the record to suggest that petitioner is disabled or has the skill or ability to meaningfully engage in educational pursuits.

as it existed when petitioner was convicted reveals no dramatic change in the basic statutory scheme with regard to gain-time other than the reduction of statutory gain-time. It is apparent that subsections 2 and 3 of Section 944.275, Florida Statutes (1979), providing extra gain-time, codify previously existing rules and regulations and add other provisions which previously were within the discretion of the appropriate administrative agency under Section 944.29, Florida Statutes (1975). This conclusion is supported by Chapter 78-304 of the Laws of Florida. (Pet. Brief A6a) Chapter 78-304, while creating Section 944.275, concurrently repealed Section 944.29, resulting in the creation of an all-inclusive gain-time statute,[5] Section 944.275, which affords no discretion beyond its own terms to the Department of Corrections with regard to the allowance of gain-time.

It is apparent that respondent has failed to recognize that Section 944.29, Florida Statutes (1975) (with implementing rules) existed concurrently with Section 944.27, Florida Statutes (1975). Respondent claims at page 24 of his brief that "[s]imple arithmetic shows that petitioner's opportunity for the accumulation of gain-time under the new statute far surpasses that which he could have earned under the old statute." In fact, petitioner's opportunity for the accumulation of gain-time under Chapter 944 as it presently exists does not

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[5] Section 944.275(5), Florida Statutes (1979), provides: "No gain-time shall be awarded except as provided in this section." This clear limitation was not previously present in Chapter 944.

surpass (nor equal) that which petitioner could have earned under Chapter 944 as it existed when petitioner allegedly committed his crime or when he was sentenced.

Furthermore, even if subsections (1)(a), (b) and (c) of Section 944.275, Florida Statutes (1975) were the first enactments to authorize discretionary extra gain-time allowances, such a fact would be totally irrevelant to the issue at hand. The cited subsections merely *authorize* the Department of Corrections to grant additional gain-time pursuant to such provisions. Such authorization must be contrasted with the statutory gain-time provided under Section 944.275 and formerly provided under Section 944.27, Florida Statutes (1975). Under both statutes, the appropriate department is mandated to grant the prescribed reductions from the sentence of every prisoner who has performed his work in the manner described by such statutes and who has committed no infraction of the rules or regulations of the appropriate department or of the laws of the State of Florida. This most significant distinction has been recognized repeatedly by respondent in his own brief where he recognizes that the new statute merely "authorizes" and "permits" the accumulation of what respondent describes as extra gain-time.[6] The new statute, just as the old statute, however, *requires* the

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[6] This distinction is emphasized by the affidavit of Louie L. Wainwright, which was attached to the response of respondent and which was reproduced in the Appendix (A 12a-13a). The affidavit shows that statutory gain-time *to be earned* is utilized in arriving at a projected release date. Conversely, only extra gain-time which has been earned in the past is utilized in such computations.

grant of *statutory* gain-time in accordance with the particular terms of each statute. Statutory gain-time for good behavior is "awarded as a matter of routine" as contrasted with "extra gain-time." Note, *Prisoner's Gain-Time: Incentive, Deterrent, or Ritual Response*? 21 U.Fla. L.Rev. 103, 104 (1968).

Again resort may be made to respondent's brief further to illustrate the point:

> "Under the old statute, the maximum amount of gain-time that could be earned was fixed and *all any person had to do* in order to be credited with the appropriate amount of gain-time at the end of each month *was to stay out of trouble.*" (Resp. Brief 25) (emphasis supplied).

In short, petitioner himself controlled his destiny relating to the 5-10-15 statutory gain-time. It is sophistry to argue that some other procedure largely discretionary in nature provides essentially the same relief. Particularly does such argument lack credibility when it is readily apparent that such discretionary procedures already coexisted with and supplemented the 5-10-15 provisions.

The Supreme Court of Florida summarized the *only difference* in the laws when it observed:

> "The new law . . . is different from the former law . . . in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence."

Harris v. *Wainwright*, 376 So.2d 855, 856 (Fla. 1979). The new argument of respondent suggesting other previously unargued differences would obviously present new matter to that Court, as well apparently to other representatives of the Attorney General of Florida.[7]

Remedial Nature of Statute

Respondent contends that comprehensive remedial legislation must be "analyzed in its entirety." (Resp. Brief 26) There is no issue in that respect. However, the case cited by respondent, *State* v. *Green*, 355 So. 2d 789 (Fla. 1978), in fact expressly states that "[a]n unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions. . . ." *Id.* at 794. This disposes of the professed concern of respondent for the inmates (Resp. Brief 28). In the present case, of course, petitioner does not con-

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[7] The Attorney General of Florida, without attribution to the Florida Supreme Court, has made the same assertion *verbatim* in an objection (Pet. Reply Brief A 10a) to a magistrate's report filed in *McCullough* v. *Wainwright*, No. 80-130 Civ. Tampa GC, a *habeas corpus* proceeding raising the same issue as that advanced here. The U.S. Magistrate on July 15, 1980 adopted the view urged here by petitioner (Pet. Reply Brief A 7a). In candor, counsel must question the attachment of unreported case pleadings in this fashion, but resolves the issue in favor of petitioner in light of the Attorney General's presentation of similar material in the appendix to his brief and in the transcendent right of this Court to know that the State of Florida does not speak with one voice on an issue of this import.

tend that any gain-time statute should be held unconstitutional per se; petitioner objects to the *ex post facto* application of a reduction in statutory gain-time to him. No issue is made as to any other aspect of the statute. Indeed, none could be made on this record.

Respondent has argued that numerous prisoners have sought and obtained mandamus orders to recompute gain-time under the new statute and opines that prisoners would not seek this type of relief if they believed that such relief would result in a loss of gain-time. As an illustration of the type of order which prisoners have sought and obtained, respondent has cited the order entered in *Storm* v. *Massey*, No. 00-128 (Fla. 1st DCA 1979), and has reproduced a copy of that order in his appendix (Resp. Brief A8). That order alone, however, manifestly does not reflect the situation in *Storm*; therefore, petitioner has reproduced in its appendix to this brief the remaining portions of the record in the *Storm* matter (Pet. Reply Brief A 16a *et seq.*). As is reflected in Storm's petition, Storm was "uncertain as to his tentative expiration date" and desired respondent to compute such expiration date in accordance with the statutory change. This uncertainty is not hard to understand in light of the fact that Storm did proceed *pro se*. Notably, respondent failed to argue that the new statute was ameliorative.

Withholding of Information

Finally, respondent has implied petitioner withholds information concerning extra gain-time earned by peti-

tioner since July 1, 1978.[8] The initial appendix prepared by petitioner in this very case, however, reveals extra gain-time earned by petitioner prior to January 1, 1979. (A 12a) An exhibit to respondent's response to the petition filed in the Supreme Court of Florida indicates that petitioner not only had the opportunity to earn extra gain-time prior to the existence of Section 944.275, Florida Statutes (1979), but that petitioner had actually earned forty-three days of extra gain-time prior to such time. Interestingly enough, *no* extra gain-time was earned in the period beginning on January 1, 1979.[9] This fact, reflected by a sworn affidavit filed by respondent

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[8] The charge is not only inaccurate, as explained in the text, but is also frivolous for at least two reasons. Initially, it is a matter of ordinary intelligence that a petitioner represented by counsel would not be seeking relief if the new statute benefited him more than did the old statute. Secondly, the amount of extra gain-time earned by petitioner is simply irrelevant. Petitioner is complaining of the enhancement of his punishment by decrease in the amount of statutory gain-time opportunity to which he was entitled at the time he allegedly committed the offense for which he is serving time. The relief he seeks is merely a prohibition in the reduction of statutory gain-time. An after the fact increase in permissible extra gain-time, however, ultimately has no bearing on a determination whether a concomitant decrease in mandated statutory gain-time violates the constitutional *ex post facto* provisions.

[9] The jurat is omitted in the appendix, but the original record reflects it was executed July 3, 1979. It is not clear by what means petitioner is to have updated this affidavit in this Court. Petitioner continues to assume that he was and is bound by the record below *as is respondent*.

(A 12a), flies squarely in the face of respondent's assertion at page 23 of his brief that prior to the implementation of Section 944.275, Florida Statutes, "the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence" (i.e., statutory gain-time).

It is, therefore, clear that the changes introduced by Section 944.275, Florida Statutes (1979), cannot be described as ameliorative, and respondent's claim that in "simple truth" petitioner is now "in a materially better position" (Resp. Brief 29)' stated charitably, is ill-founded.

There remains only the question raised by respondent whether such changes, which reduce petitioner's gain-time and thereby prolong his incarceration, must violate the due process clause in order to violate the *ex post facto* prohibition. It is to this question we now turn.

THE NEW STATUTE CLEARLY IS AN EX POST FACTO LAW

There is No Due Process Issue in this Case

Respondent surprisingly asserts that petitioner's claim for relief is based on a "constitutionally protected liberty interest in unearned gain-time." (Resp. Brief 32) In so stating, respondent misconstrues not only the entire substance of petitioner's brief, but indeed the scope of this Court's grant of certiorari. The question presented by this case, stated succinctly, is whether Section 944.275, Florida Statutes (1979), as applied to petitioner,

violates Article 1, §10, clause 1 of the United States Constitution, the "*ex post facto*" clause. To the extent that petitioner briefly discussed the applicability of the due process clause of the Fourteenth Amendment to gain-time, it was only to note that accrued gain-time is protected by the due process clause, *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974), and to assert that a liberty interest so protected when once acquired should also be a liberty interest "whose deprivation results in a forbidden increase in punishment." (Pet. Brief 56) Thus, it is rationally consistent to argue that the statutorily prescribed opportunity to acquire such liberty interest would at least conceptually be encompassed within the *ex post facto* clause.[10]

However, this Court has granted review of the *ex post facto* issue, not an issue arising under the due process clause of the Fourteenth Amendment. Petitioner does assert that Section 944.275, Florida Statutes (1979) violates the *ex post facto* prohibition, whether or not it also violates the due process clause. In this respect, respondent's citation of *Jackson* v. *Reese*, 608 F.2d 159 (5th Cir. 1979), is misleading. The Fifth Circuit in that case held that a denial of parole, as distinguished from revocation of parole, did not amount to a loss of liberty and that, therefore, it did not need to address whether the parole denial procedure comported with due process.

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[10] The fact that Florida need not grant an opportunity to acquire gain-time in the first instance is irrelevant once it is granted, *cf. Meachum* v. *Fano*, 427 U.S. 215, 226 (1976).

Id. at 160. Respondent leaps from this holding to the conclusion that "since Petitioner has not shown any deprivation of a constitutionally protected liberty interest, the court need not address the issue of whether Florida's new gain-time statute now under attack constitutes *ex post facto* legislation." (Resp. Brief 44-45) As this Court is well aware, the protection of due process comes into play where there is a denial of liberty or property. Respondent's argument, however, is that where there is no such denial, no other constitutional rights apply, or, in particular, the *ex post facto* prohibition does not apply. Neither *Jackson* v. *Reese*, *supra*, nor any other authority of which petitioner is aware, supports that amazing conclusion. The *ex post facto* prohibition is a constitutional protection separate and distinct from the due process clause.

Little else need be said concerning respondent's argument, which is devoted largely to an effort to disprove what petitioner does not contend. Respondent's remaining discussion of the applicability of the *ex post facto* prohibition is devoid of any citation of *Calder* v. *Bull*, 3 Dall. 386 (1798); *Cummings* v. *Missouri*, 4 Wall. 277 (1867); *Kring* v. *Missouri*, 107 U.S. 221 (1883); or *Lindsey* v. *Washington*, 301 U.S. 397 (1937). Respondent thus ignores some of the most important *ex post facto* decisions of this Court. Respondent does address the minority views of the New Jersey courts, which petitioner noted in discussing *Zink* v. *Lear*, 28 N.J. Super. 515, 101 A.2d 72 (N.J. App. Div. 1953). Aside from an attempt to distinguish some Louisiana cases, however, respondent does not confront the overwhelming majority

of state and federal decisions which have considered these issues and almost uniformly held statutes such as Florida's to violate the *ex post facto* prohibition.

Finally, respondent attempts to distinguish *Greenfield* v. *Scafati*, 277 F.Supp. 644 (D. Mass. 1967), *affirmed*, 390 U.S. 13 (1968). It is not too much to state that respondent completely misunderstands and, indeed, misstates the *Greenfield* holding. According to respondent, "Greenfield simply struck down a statute passed after his initial conviction which deprived parole violators of accumulated good time upon their return to prison." (Resp. Brief 47) According to the actual opinions, the Massachusetts statute did no such thing. Rather, it provided that a parole violator "shall not receive deductions described in this section [for good conduct] for any of the first six months after he has returned to the correctional institution." *Greenfield* v. *Scafati*, 277 F.Supp. at 645. The only possible distinction between *Greenfield* and the case at bar lies in the deprivation for six months of any opportunity to earn gain-time in *Greenfield*, whereas in the case at bar, the petitioner is permanently deprived of the opportunity to earn gain-time at the rate set at the time of the crime. Petitioner is unaware of any authority giving effect to such a distinction.

Respondent reverts to his "annexed" argument in attempting to distinguish *Greenfield* on the basis that the availability of good conduct deductions was considered an element of the sentence under Massachusetts law,

whereas it is not under Florida law.[11] This contention is not borne out by the record. (Resp. Brief 48)

It cannot be doubted, however, that the question whether a statute "inflicts a greater punishment, than the law annexed to the crime, when committed," *Calder* v. *Bull*, 3 Dall. 386, 390 (1798), is indeed a question of federal constitutional law. Respondent apparently relates the concept of annexation to a doctrine of "vested rights." This is entirely misplaced. It does not matter whether petitioner is entitled, as a matter of vested right, to gain-time; in *Greenfield*, for example, the prisoner's entitlement to parole lay "in the discretion of the Parole Board." 277 F.Supp. at 646. Notwithstanding the fact that there was no such entitlement, the court noted in relying on a decision of this Court:

> " It would not follow because a prisoner might not receive parole that it would not be an unlawful *ex post facto* burden to deprive him altogether of the right to be found qualified. Rather, we see no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for and hence earn, parole. Each, to quote *In re Medley*, *supra*, materially 'alters the situation of the accused to his disadvantage.' "

Id. Without question, Section 944.275, Florida Statutes (1979) violates the *ex post facto* prohibition by increasing the punishment to which Petitioner may be subject.

[11] In fact the calculation of a "tentative date of release" in Massachusetts as described in *Greenfield* (277 F.Supp. at 645) is precisely the same procedure followed under the old statute in Florida, *Harris* v. *Wainwright*, 376 So.2d 855, 856 (Fla. 1979). This is conclusively shown in this case: *see* "TED" ("tentative expiration date") in upper left hand corner of petitioner's reply in the lower court (A 17a).

CONCLUSION

Respondent quotes Judge Henry Friendly's observation, "[T]here is a human difference between losing what one has and not getting what one wants." Friendly, *Some Kind of Hearing*, 123 U.Pa. L.Rev. 1267, 1296 (1974).[12] There can be no quarrel with that comparison in a different context; however, no analogy exists here. The competing values are represented on the one hand by a claim to entitlement to benefits solemnly guaranteed by a state legislature and presumptively relied upon both by prisoner and trial judge, and, on the other, by a claim of a unilateral right to reduce these benefits. The resolution of that conflict occurred at the birth of the Republic. The *ex post facto* clause was intended to preclude the necessity for such claims. If it were otherwise, the clause has been rendered meaningless.

Respectfully submitted,

THOMAS C. MACDONALD, JR.
P.O. Box 3324
Tampa, Florida 33601
(813)273-5000

---

[12] Also quoted in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S.1, 10 (1979).

APPENDIX

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Section 944.27 Florida Statutes (1975)

944.27 Gain-time for good conduct; schedule of allowance; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

(1) The [Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

(Reviser's historical footnotes omitted in printing)

Section 944.29, Florida Statutes (1975)

944.29 Extra good-time allowance. — The [Department of Offender Rehabilitation] may allow, in addition to time credits, an extra good-time allowance for meritorious conduct or exceptional industry.

(Reviser's historical footnote omitted in printing)

Section 945.21, Florida Statutes (1975)

945.21 Regulations of the department.—

(1) The [department] is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the [department]. In addition to specific subjects otherwise provided for herein, regulations of the [department] may relate to:

(a) Conduct to be observed by prisoners;

(b) Punishment of prisoners;

(c) Gain-time for good conduct of, release payments to, and release transportation of, inmates;

(d) Uniforms for inmates and custodial personnel;

(e) Rules of conduct of custodial and other personnel.

(f) Classification of personnel and duties assigned thereto;

(g) Credits for confinement prior to commitment to the [department];

(h) Payments to prisoners for work performed. Such payments, if any, to be made from the profits of the Industrial Trust Fund. Such regulations to include restrictions on the use of earnings, including payments for support of dependents and release reserves.

(i) Visiting hours and privileges;

(j) Mail to and from inmates;

(k) The operation of canteens and the participation in canteen funds;

(l) The feeding of prisoners, including diet and menus, and the furnishing of health and comfort items to indigent prisoners;

(m) Such other regulations as in the opinion of the [department] may be necessary for the efficient operation and management of the correctional system.

(2) Regulations of the [department] shall be adopted and filed with the Department of State as provided in chapter 120.

(Reviser's historical footnote omitted in printing)

RULES OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES DIVISION OF CORRECTIONS
CHAPTER 10B-20
[Florida Administrative Code]
[Effective April 22, 1975]

10B-20.01 Authority of the Director: The Director shall effect the modification of inmate's sentences as prescribed by law and as hereinafter set forth.

10B-20.02 Gain Time. The Director shall keep a record of the conduct of each inmate. Deduction shall be made from the term of an inmate's sentence when no charge of misconduct has been sustained against the inmate and when his institutional record has been satisfactory. Such deductions shall be deemed earned and the inmate shall be entitled to credit as soon as the inmate has served such time as when added to the deductible allowance provided by statute will equal a month. An inmate serving two or more cumulative sentences shall be allowed deductions as though the sentence were all one sentence, and such deductions shall be subject to forfeiture as though the sentences were all one sentence. Deductions from the term of an inmate's sentence shall be made pursuant to the following time schedule: [5-10-15 schedule omitted.]

10B-20.03 Extra Gain Time. An inmate who faithfully performs the assignments given him in a conscientous (sic) and cheerful manner over and above that which may normally be expected of him and against whom no disciplinary report has been filed within the preceding six months, and whose conduct, personal adjustment and individual effort towards his own rehabilitation shows his desire to be a better than average inmate, may be granted on an individual basis from one to six days per month extra gain time to be deducted from the term of his sentence.

10B-20.04 Special Gain Time.

(1) An inmate who is assigned to work at the construction of a correctional institution or on any other type of building construction project authorized by the Department, and who is eligible to receive special gain time and may be granted deductions from the term of his sentence on the basis of one to fifteen days per month in lieu of extra gain time; but only for those periods of time wherein he is assigned to such construction project.

(2) An inmate who does some outstanding deed, such as the saving of a life, recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence may be granted special gain time on the basis of from one to sixty days.

10B-20.05 Forfeiture of Deductions Earned.

(1) The Director may cause to be forfeited any and all deductions that may have been granted to an inmate for the violation by such inmate of any rule. Likewise, the Director may restore any such deduction so forfeited if in his opinion there are sufficient reasons for such restoration.

(2) If any inmate is convicted of escape, the Division may without notice or hearing declare a forfeiture of all gain time earned and extra gain time allowed such prisoner, if any, prior to such escape.

(3) Whenever a conditional pardon granted to an inmate by the Governor with the consent of at least three members of the cabinet or a conditional parole granted by the Florida Parole and Probation Commission is revoked and such inmate is ordered by the commission to be returned to the institution, such inmate may be deemed to forfeit all deductions granted

up to the time of his release under such conditional pardon or parole.

10B-20.06 Actual Release Date. In determining the actual release date of an inmate, the term of his sentence less the number of days deducted from such sentence as has been provided should be added to the sentence date. The sentence actually expires at midnight of this date, but release may be granted at any hour of such date.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 80-130 Civ.T.-GC

SAMUEL MCCULLOUGH, #055520, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation,
State of Florida, *Respondent.*

REPORT AND RECOMMENDATION

This is a habeas corpus petition by a State prisoner, Samuel McCullough. On August 25, 1976, Petitioner entered a plea of nolo contendere and was convicted of burglary, grand larceny, possession of a firearm by a convicted felon and carrying a concealed weapon. Upon his plea, Petitioner was sentenced to fifteen (15) years imprisonment on each charge, with all sentences to run concurrently.

Petitioner does not complain of his conviction nor the sentence. Rather, he seeks to shorten the possible duration of his confinement. Petitioner's complaint focuses on a change in the provision of Florida Statutes §941.27, relating to "gain time." At the time of Petitioner's conviction in 1976, Florida Statutes provided that every prisoner *shall* be granted "gain time" credit. Thereafter, effective July 1, 1978, Florida Statutes, §941.27 was repealed and §941.275 was adopted. Florida Statutes, §941.275 provides a new, less generous "gain time" schedule.

In light of the amendment to the statutory provision relating to the "gain time" schedule, Petitioner complains that he could potentially serve a greater term of imprisonment

than he would have served under Florida Statutes, §941.27, which was in effect at the time he was sentenced. Petitioner urges that the amendment changed the law to his disadvantage after his sentencing, and is therefore void as to him because of the prohibition contained in the United States Constitution against *ex post facto laws.*

Respondent urges, however, that the subsequent amendment of the "gain time" statute does not deny Petitioner any vested right; it is Repondent's position that the gain time provision is a matter of legislative grace.

Petitioner has presented his claim by means of a petition for writ of habeas corpus to the Florida Supreme Court. The Court denied Petitioner's application, based on the precedent of *Harris* v. *Wainwright*, _____ So.2d _____ (Fla. 1979), a copy of which decision is attached as Exhibit II to the Supplemental Response filed herein, and on the precedent of *Genter* v. *Graham*, _____ So.2d _____ (Fla. 1979), a copy of which is also attached to the Supplemental Response filed herein. Respondent relies on the rationale and opinion of the Florida Supreme Court in *Harris.*

A grant of parole (rather than a right to early release, subject only to the continued good behavior of a prisoner), provides no more than a mere hope that a benefit may be obtained). [*See Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979)]. However,

> ". . .the State having created the *right* to good time and itself, recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances

and required by the Due Process Clause to insure that the State created right is not arbitrarily abrogated." [*Wolff* v. *McDonald*, 418 U.S. 539, 557 (1973)].

A reading of relevant cases indicates that Petitioner and others similarly situated have a "liberty interest" as a result of "gain time" statutes. In light of this, the application of the provisions of Florida Statutes, §941.275, instead of the provisions of its predecessor, Florida Statutes, §941.27, is an abrogation of Petitioner's rights. Based on *State* v. *Curtis*, 363 So. 2d 1375 (La. 1978), and the Federal cases cited therein, I recommend that the petition be granted and that the Petitioner be afforded the opportunity to earn gain time pursuant to the provisions of Florida Statutes, §941.27, which was the controlling statutory provision at the time he was sentenced. See also: *Shepherd* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977). At this time, there are several other petitions for writ of habeas corpus which raise the same issue, pending in this court. To promote judicial economy and efficiency, perhaps at some early stage these cases should be consolidated.

This *15th* day of July, 1980, at Tampa, Florida.

PAUL GAME, JR.
Paul Game, Jr.
United States Magistrate

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-130 Civ.T.-GC

SAMUEL MCCULLOUGH, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,
Respondent.

TO: The Honorable Geroge C. Carr, United States District Judge.

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE AND REQUEST FOR DE NOVO HEARING OR, IN THE ALTERNATIVE DE NOVO CONSIDERATION

The Magistrate has ruled that Petitioner is being deprived of "gain time" by an ex post facto law. The Magistrate opines that since Section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of gain time than did its predecessor, Section 944.27, Florida Statutes, then the application of the new statute to Petitioner makes the statute an ex post facto law as it was not in effect at the time of the commission of the crimes for which Petitioner stands convicted. With due respect, the Honorable Magistrate is wrong.

The new law (1978) is different from the former law in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

II

This habeas action presents the identical question which the United States Supreme Court has agreed to decide in *Weaver* v. *Graham*, No. 79-5780, cert. granted 48 L.W. 3602. See 48 L.W. 3632. Further consideration of this case should have been stayed by the Magistrate, pending the Supreme Court's decision in *Weaver* v. *Graham*, supra.

III

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. See *Gilstrap* v. *Clemmer*, 284 F.2d 804 (4th Cir. 1960); *Hiatt* v. *Compagna*, 178 F.2d 42 (5th Cir. 1949) affirmed 340 U.S. 880, 71 S.Ct. 192, L.Ed. 639 (1950); *Estabrook* v. *King*, 119 F.2d 607 (8th Cir. 1941); *Kastel* v. *Fish*, 36 F.Supp. 700 (D.C.Md. 1931); *Shattuck* v. *Grider*, 493 P.2d 829 (Okl. Cr. 1972) citing with approval *Dear* v. *Mayo*, 153 Fla. 164, 14 So.2d 267 (1943); *People ex rel. Colletti* v. *Pate*, 31 111.2d 354, 201 N.E.2nd 390 (1964); *Comerford* v. *Commissioner of Correction*, 335 Mass. 714, 141 N.E.2d 893 (1957); *Lembersky* v. *Parole Board of Department of Correction*, 332 Mass. 290, 124 N.E.2d 521 (1954).

The Florida courts have taken a similar view. *Mayo* v. *Lukers*, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. The Florida Supreme Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time pro-

cedure. In *Dear* v. *Mayo*, 153 Fla. 164, 14 So.2d 267 (1943), the Florida Supreme Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In *Kimmons* v. *Wainwright*, 338 So.2d 239 (Fla. 1st DCA 1976), the court said that gain time is given to prisoners through the beneficence of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

V

This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. *Dowd* v. *Sims*, 229 Ind. 54, 95 N.E.2d 628 (1950). This is not a situation in which the entire scheme of criminal penalties has been revised. *Goldsworthy* v. *Hannifin*, 86 Nev. 252, 468 P.2d 350 (1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. *In re Dewing*, 19 Cal.3d 54, 136 Cal.Rptr. 708, 560 P.2d 375 (1977); *In re Valenzuela*, 275 Cal.App.2d 483, 79 Cal.Rptr. 760 (3rd Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. *Love* v. *Fitzharris*, 460 F.2d 382 (9th Cir. 1972).

VI

Petitioner was originally sentenced to ten years and except for the grace of the Florida legislature, Petitioner is required to serve his full ten years. The gain time statute is not a method of *initially* computing an inmate's prison time. The Florida legislature is free to revoke, modify, or pass statutes dealing with the operation of its prison system without fear of Federal intervention.

A *federal* prisoner does not have a vested right in earned good-time, and good-time earned does not operate to reduce his original sentence. *Cooper* v. *United States Board of Parole*, 337 F. Supp. 235 (D.C.Ark. 1972).

The right to good time deductions is a privilege bestowed by the legislature. *Singleton* v. *Tooney*, 218 F.2d 526 (1955).

The right to good-time allowance under former section 710 of the United States Code was contingent and does not become vested until prisoner had earned the right by compliance with such section, and *Congress, having extended the privilege, could withdraw it except as to those persons in whom the privilege had ripened into a vested right. Douglas* v. *King*, 110 F.2d 911, 127 A.L.R. 1200 (1940); *Estabrook* v. *King*, 119 F.2d 607.

A good-time statute is effective not only to persons brought to prison after the date of enactment, but also as to persons brought to prison before its date. *Kastel* v. *Fish*, 36 F.Supp. 700.

Whether there is a repeal of a statute providing for a good-time allowance by the enactment of a later statute on the same subject depends on the intent of the legislature. *Kastel* v. *Fish*, supra; *Kobler* v. *Nicholson*, 117 F.2d 344; *Singleton* v. *Shafer*, 313 F.Supp. 1094 (1970).

A statute passed *after* the enactment of a statute providing for deductions from sentences for good conduct has been construed as amending and modifying the latter. *Bickel* v. *Hiatt*, 66 F.Supp. 748.

A good-time statute is not invalid because it modifies the effect of statutes in force before its enactment. *Chandler* v. *Johnston*, 133 F.2d 139.

Federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving shocking deprivation of fundamental rights. *Baldwin* v. *Smith*, 446 F.2d 1043 (2nd Cir. 1971).

State should be given broad discretion to determine which of the variety of possible rehabilitative and disciplinary techniques will be most effective. *Balwin* v. *Smith*, supra.

Good-time allowances do not reduce sentence but only enable the prisoner to serve the latter part of his sentence outside prison walls, 313 F.2d 21 (10th Cir. 1962).

The early release of prisoners under a good-time statute is a matter of legislative grace and is not constitutionally mandated. *Earnest* v. *Willingham*, 406 F2d 681 (10th Cr. 1969); *Alvarez* v. *Turner*, 422 F.2d 214 (10th Cir. 1970).

The repeal by the state of its statute authorizing commutation or diminutation of sentence for good behavior *did not constitute an ex post facto law inflicting greater punishment*. *Singleton* v. *Shafer*, 313 F.Supp. 1094 (1970).

VII

WHEREFORE, your undersigned respectfully moves this Honorable Court to reject the Report and Recommendation of the Magistrate and dismiss the instant habeas petition. In the alternative, your undersigned prays that further consideration of this case be stayed pending the United States Supreme Court's decision in *Weaver* v. *Graham*, No. 79-5780, cert. granted 48 L.W. 3602 (1980). See 64 L.Ed 270 (1980). Respondent hereby requests a hearing de novo, or a de novo determination of the issues herein.

Respectfully submitted,

JIM SMITH
Attorney General
MICHAEL A. PALECKI
MICHAEL A. PALECKI
Assistant Attorney General
Park Trammell Building
1313 Tampa Street
Suite 804
Tampa, Florida 33602
Counsel for Respondent

(Certificate of service omitted in printing)

IN THE FIRST DISTRICT COURT OF APPEALS
Tallahassee, Florida

Case No. 74-208 CF-A-01, [illegible]
JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent,*
L.L. WAINWRIGHT, *Additional Respondent.*

PETITION FOR WRIT OF HABEAS CORPUS OR FOR WRIT OF MANDAMUS

JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to the *Florida Constitution; Article V; Section 4(6)(3); and Florida Appellate Rules, Rule 4.5.*

JIM K. STORM
Petitioner, pro se
P.O. Box 221
Raiford, Florida 32083

Comes now Jim K. Storm, Petitioner in pro se, and presents this his petition for a writ of habeas corpus, and a petition for writ of mandamus, and represents that he is being denied gain time by Respondents in contravention of the Laws, and statues [sic] of the State of Florida, and says:

Appellant would respectfully request this Honorable Court to take Judicial Notice that the standards to measure pro se petitions are loose enought [sic] to accommodate the inartful pleader. *See Haines* v. *Kerner,* 404 U.S. 519, 520-521. 92 S.Ct. 594, 595-596. 30 L.Ed. 2nd 652, 653-654 (1972); cf. *Faretta* v. *California,* 422 U.S. 806, 95 S Ct. 2525 45 L Ed 2d 562 (1975)

STATEMENT OF THE FACTS

In October 1974, Collier County Petitioner was sentenced to five (5) years, Case No. 74-208 CF-A-01. In April of 1977, Petitioner was charged with escape, and received a two, and one half (2 1/2) year sentence, also the loss of approximately 303 days good time. Case No. 77-2221-C, Hillsborough County. Petitioner release date on said five (5) years is August 31, 1978.

Petitioner received a tentative expiration date of November 7, 1979 issued by Respondent R.D. Massey. This was issued approximately November 30, 1978. Petitioner is now stating. Petitioner has not been updated with earned gain time allowed to Petitioner by Law pursuant to chapter 78-304, Laws of the State of Florida, affective [sic] July 1, 1978.

Petitioners [sic] work supervisor Sgt. M.C. Shaw, and Petitioners [sic] clarification officer agreed to that Petitioner would be given full and maximum gain aloted [sic] by Law, pursuant to chapter 78-304, Laws of the State of Florida. Therefore Petitioner would have an approximate release date of July, 1979.

Petitioner is now stating negligence on the part of the Respondent to update Petitioners [sic] new release date in which Respondents are compelled by Law to do; *Claxton Davis* v. *Wainwright* case No. 54-968 (Fla. Sup. Ct. 2/8/79).

Petitioner states that if a new release date is not updated by Respondents, Petitioner could be, or will be illegally detained by the Correctional Department of the State of Florida.

ARGUMENT

Mandamus issues to force implimentation [sic] of new Florida gain time Statute.

Claxton Davis v. *Wainwright,* case No. 54-968 (Fla. Sup.Ct. 2/8/79). A new gain time Law was enacted by the

1978 Florida legislature, to be effective July 1, 1978 in August 1978. Petitioner Davis sought a peremptory unit of Mandamus to force the defendant department of corrections commissioner to implement the new Law. The court entered the following order;

Whereas, the Supreme Court of The State of Florida, has directed the peremptory wait of Mandamus issue against you, this is therefore, to command that you, L.L. Wainwright etc. allow the gain time to this petitioner pursuant to Chapter 1978, C. 78-304 §2, eff. July 1, 1978.

PRAYER

Therefore Petitioner herein prays this Honorable Court to promptly order the Respondents to correctly commpute [sic] the afore named, [sic] providing Petitioner with the approximately six (6) months gain time from July 1, 1978 to December 31, 1978, or as an alternative, for this Honorable Court to determine the correct release date of Petitioner.

In the intirist [sic] of Justice, and that further irriparable [sic] injury not continue. Petitioner prays this Honorable Court for the relief requested herein, and any other relief the Court deems proper.

AFFIDAVIT IN FORMA PAUPERIS

I. Jim K. Storm, hereby dose [sic] depose and say, that I am the Petitioner in the above styled cause, and that I am without funds, or security, and hereby move to be allowed to procede [sic] in Forma Pauperis in these matters.

(Jurat omitted in printing)

JIM K. STORM
53179
Petitioner, pro se
P.O. Box 221
Raiford, Florida

(Certificate of service omitted in printing)

[TRANSCRIBED FROM LONGHAND]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

ORDER TO SHOW CAUSE

Respondent is directed to show cause, within twenty days, why the relief requested by the petition should not be granted. Florida Rules of Appellate Procedure 9.100(f). Any reply by petitioner to the response may be filed within ten days after the date appearing in the certificate of service of the response, unless otherwise ordered by the court.

By Order of the Court dated this 20th day of June, A.D. 1979. Acting Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Ann E. Booth.

A True Copy

ATTEST:

RAYMOND E. RHODES, *Clerk*

SANDRA JOYNER,
Deputy Clerk
District Court of Appeal,
First District
Tallahassee, Florida

IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore entered in the captioned proceeding on June 20, 1979 and says:

I.

Respondent holds petitioner in custody pursuant to commitments issued November 4, 1974 and August 1, 1977, copies of which are attached as Exhibits 1 and 2 respectively.

II.

Apparently petitioner is uncertain as to his tentative expiration date and desires respondent to compute same for him. Accordingly respondent attaches hereto the affidavit of Louis L. Wainwright showing a computation of petitioner's time and a tentative expiration date of October 30, 1979. This affidavit is attached as Exhibit 3. The computation of time as shown in Exhibit 3 takes into consideration Section 944.275, Florida Statutes, effective July 1, 1978, but not implemented by the Department of Corrections until January 1, 1979. This means that petitioner's gain time is based on the old statute, Section 944.27, Florida Statutes, up until January 1, 1979, even though the statute was repealed effective July 1, 1978.

III.

The new gain time statute, Section 944.275, Florida Statutes, is not an *ex post facto* law and does not deprive petitioner or any other prisoner of any vested right. See A.G.O. 078-96, copy of which is attached as Exhibit 4.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Wallace E. Allbritton
Assistant Attorney General

Counsel For Respondent
The Capitol
Tallahassee, Florida 32301

(Certificate of service omitted in printing)

DEPARTMENT OF CORRECTIONS

1311 Winewood Boulevard
Tallahassee, Florida 32301
Telephone: (904) 488-5021

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

Personally appeared before me this day Louie L. Wainwright, who being duly sworn deposes and says:

That he is the Secretary of the Department of Corrections; that as such Secretary he is the official custodian of all prisoners and the records pertaining thereto;

That Jim King Storm, #043831, was originally received into the Department on November 22, 1974, under sentence of five (5) years with credit for 57-days county jail time, imposed November 4, 1974, in the Collier County, Florida, Circuit Court. On August 1, 1977, he received a two and one-half (2 1/2) years sentence in Hillsborough County, Florida, Circuit Court to run consecutive to his original five (5) years sentence;

That the current tentative expiration date of Jim King Storm's cumulative sentence is October 30, 1979, calculated as follows:

Sentence begins 11/4/74	27336 (Days elapsed since 1900)
Sentence in days (cumulative)	+2738
Jail Time Credit	-57
Statutory Gain Time earned prior to 1/1/79 on 1551 days served	-801

Gain Time forfeited due to escape	+180
Time out on escape	+24
Extra Gain Time earned prior to 1/1/79	-84
Statutory Gain Time earned or to be earned from 1/1/79 on 303 days remaining to be served on sentence	-127
Work Gain Time earned since 1/1/79	-52
Tentative Expiration Date 10/30/79	29157 (Days elapsed since 1900)

LOUIE L. WAINWRIGHT
Louie L. Wainwright
Secretary

Department Of Corrections

(Jurat omitted in printing)

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS

Office Of The Attorney General
The Capitol
Tallahassee, Florida 32304

July 18, 1978

Mr. Louie L. Wainwright
Secretary, Department of
Offender Rehabilitation
Tallahassee, Florida 32301

Re: GAIN-TIME—PRISONERS—DEPARTMENT OF OFFENDER REHABILITATION—applicability of new gain-time formula prescribed by 1978 House Bill 811 to all inmates incarcerated on July 1, 1978. House Bill 811; §944.27, f.S. (1977), §944.275, F.S. (1978 Supp.).

Dear Mr. Wainwright:

This is in response to your request for an opinion on the following questions regarding 1978 House Bill 811, effective July 1, 1978:

(1) Does House Bill 811 Affect All Inmates Incarcerated In The Department Of Offender Rehabilitation On That Date?

(2) If The Answer To Question (1) Above Is No, Does House Bill 811 Apply To All Persons *Sentenced* After July 1, 1978, Or Only To Persons Sentenced For Crimes *Committed* After July 1, 1978?

House Bill 811, the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted

to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271 and 944.29, F.S. (1977), were repealed and a new §944.275, F.S., was created to replace the repealed sections. I have found nothing in the new §944.275, or in any section of HB 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. Also, nothing in HB 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate or any vested, enforceable right.

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, e.g., Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it sees clear that the *Legislature's* allowance of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion.

Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In Dear v. Mayo, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of *grace rather than of right,*" and that "[t]he state may offer such grace under the subject to such conditions as it may consider most conducive to accomplish the desired purpose." (e.s.) In Mayo v. Lukers, 53 So.2d 916, 917 (Fla. 1951), it was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in Kimmons v. Wainwright, 338 So.2d 239 (1 D.C.A. Fla. 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

SUMMARY

House Bill 811, which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

Sincerely,

ROBERT L. SHEVIN
Robert L. Shevin
Attorney General

Prepared By:

JERALD S. PRICE
Jerald S. Price
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 00-128

JIM K. STORM, *Petitioner,*

v.

R.D. MASSEY, *Respondent.*

ORDER

The petitioner's "Request To Take Judicial Notice" is noted. Petitioner's gain time was recomputed after this court's mandate of August 2, 1979, ordering the Department of Corrections to comply with Chapter 78-304, Laws of Florida, and implemented Section 944.275, Florida Statutes (Supp. 1978), as of July 1, 1978. Chapter 78-304 is not an unconstitutional ex post facto law as applied to petitioner. "[T]he granting of the gain time allowance is an act of grace rather than a vested right. . . ." *Mayo* v. *Luker,* 53 So.2d 916 (Fla. 1951). Accord, *Kimmons* v. *Wainwright,* 338 So.2d 239, 240 (Fla. 1st DCA 1976). Moreover, the gain time statute does not concern the crime one is convicted of or the statutory sentence for that crime: "It is an established rule of construction that constitutional provisions regarding ex post facto laws relate only to criminal and penal laws, and the prohibition against ex post facto laws is directed primarily against substantive changes in statutes concerning crimes of penalties. . . ." 9 Fla. Jur., *Criminal Law* §64, p. 102.

By Order of the Court dated this *28th* day of September, A.D. 1979, Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Anne C. Booth.

A True Copy

ATTEST:

Raymond E. Rhodes, *Clerk*

RAYMOND E. RHODES
District Court of Appeals,
First District
Tallahassee, Florida

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

IN THE TWENTIETH JUDICIAL CIRCUIT COURT

Collier County. Fall Term, 1974

Conviction for Count 11—Uttering A Forged Instrument

Date of conviction: November 4th, 1974

Date of sentence imposed: November 4th, 1974

Term of sentence: Five (5) Years State Prison, credit given for time served of 57 days.

STATE OF FLORIDA, *Plaintiff,*

v.

JIM KING STORM, *Defendant.*

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Information judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections,

by and through your director, superintendents, wardens, and other officials, to keep and safety imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Harold S. Smith

Judge of said Court, as also Margaret T. Scott

Clerk, and the Seal thereof, this the 4th day of November, 1974

MARGARET T. SCOTT, *Clerk of said Court*

By: PEGGY ROGERS D.C.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

CIRCUIT COURT-CRIMINAL JUSTICE DIVISION

Hillsborough County. Spring Term, 1977

Conviction for Escape

Date of conviction: August 1st, 1977

Date of sentence imposed: August 1st, 1977

Term of sentence: Two and one-half (2 1/2) years to run consecutively with present sentence now serving and concurrently with 77-2388-C.

STATE OF FLORIDA, *Plaintiff,*

v.

JIM KING STORM, *Defendant.*

Case No. 77-2221-C

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the

custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safety imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Robert W. Rawlins, Jr.

Judge of said Court, as also James F. Taylor Jr.

Clerk, and the Seal thereof, this the 1st day of August, 1977

JAMES F. TAYLOR, JR. *Clerk of said Court*

By:LINDA GRENE

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)